

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Petition of the Association for Local)
Telecommunications Services (ALTS) for a)
Declaratory Ruling Establishing Conditions) CC Docket No. 98-78
Necessary to Promote Deployment of)
Advanced Telecommunications Capability)
Under Section 706 of the Telecommunications)
Act of 1996)

COMMENTS OF THE
COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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**COMMENTS OF THE
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

The Commercial Internet eXchange Association ("CIX"), by its attorneys, files these comments in support of the May 27, 1998 "Petition of the Association for Local Telecommunications Services For a Declaratory Ruling" (the "ALTS Petition" or "Petition"). CIX is a trade association that represents over 150 Internet Service Providers who handle over 75% of the United States' Internet traffic. CIX works to facilitate global connectivity among commercial Internet service providers ("ISPs") in the United States and throughout the world. A CIX membership list is attached hereto.¹

The Internet industry is experiencing a period of unprecedented growth and promise. The growth may be measured by the capabilities of computer hardware, the rapid development of Internet content, and the new networks being forged by Internet service providers. For example, the number of Internet hosts that store information, interact, and relay communications increased

¹ The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

from 1.3 million in 1993 to 29.6 million in January of 1998.² Competition in backbone offerings is flourishing. All of the major backbone providers including AT&T, MCI, Sprint, PSINet, UUNET, and Qwest are rapidly deploying advanced new broadband networks.³

Perhaps main obstacle to realizing more from the promise of the Internet, and the goals of Section 706, is the ILECs' stubborn refusal to offer local telecommunications on an open and reasonable basis to emerging competitors, as provided for in the Telecommunications Act of 1996 (the "1996 Act"). Instead, the ILECs perpetuate an environment that benefits only the monopolist, while it stifles competition and innovation. CIX agrees with ALTS that the Commission should declare these ILEC activities to be unlawful. Further, the Commission's actions implementing Section 706 should be consistent with progress already taken by the States, such as subloop unbundling.

I. ILEC Telecommunications Services Used For Advanced Data Services Are Subject to the Requirements of the 1996 Act

ISPs can offer Internet services that compete with the ILEC-integrated DSL/Internet offerings only when CLECs have access to the ILEC's network elements and interconnection, as required by the 1996 Act. Unfortunately, the current regulatory scheme does not yet permit ISPs to obtain functional collocation or access to UNEs.⁴ CLECs and ISPs can, however, jointly offer the American consumer a viable choice of advanced data service providers, so long as the in-region ILEC meets its obligations under the 1996 Act. Equally unfortunate is the fact that, as

² Internet Domain Survey, January, 1998, Produced by Network Wizards and available on the World Wide Web at <<http://www.nw.com/>>.

³ See CIX Comments on Petition of Bell Atlantic, CC Docket No. 98-11, at 7-8 (filed April 6, 1998).

⁴ CIX believes that the Commission should act expeditiously to change the current CEI/ONA rules to provide ISPs with additional rights. See Comments of CIX, CC Dkt. Nos. 95-20, 98-10 (filed March 27, 1998).

ALTS describes, the ILECs have chosen a practice of stalling advanced data service competition by denying to CLECs their rights under the 1996 Act. CIX strongly urges the Commission to promote advanced telecommunications services by outlawing these ILEC practices.

A. Enforcement of ILEC UNE Obligations Can Best Promote Advanced Telecommunications Capabilities

Unbundling of the ILEC network is part of the essential fabric of the 1996 Act creating a federal policy to open up the local telecommunications market. 47 U.S.C. § 251(c)(3). Unbundling serves this goal in a number of ways. First, it permits new entrant carriers to establish an early foothold in the marketplace, by combining their own more limited facilities with the elements of the ILECs' ubiquitous network. As noted by the Conference Report, "[i]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service . . . [s]ome facilities and capabilities . . . will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251."⁵ Second, unbundling allows competing providers to recombine the ILEC's UNEs with other equipment or services to yield a more efficient offering, or to offer niche services that the ILEC may be unwilling to furnish. Finally, even in areas where no direct competition may exist, the threat of competitive entry using cost-based UNEs adds competitive pressure on ILEC pricing and service practices.

The stalling tactics of the ILECs, as described in the Petition (at 15-17), circumvent the clear language and intent of the 1996 Act because the ILECs' xDSL offerings meet definitions of "telecommunications" and "telecommunications services."⁶ As such, the components that make

⁵ S. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 148.

⁶ The fact that the ILEC may integrate its xDSL service with its Internet access service does not in any way alter the regulatory treatment of the underlying transmission service. AT&T Frame Relay Declaratory Ruling, Memorandum Opinion and Order, 10 FCC Rcd.

(Footnote continued to next page)

up that telecommunications service are "network elements." 47 U.S.C. § 152(29)("network element' means a facility or equipment used in the provision of a telecommunications service").⁷ By establishing this broad definition, Congress unequivocally laid down statutory law and a public policy for broad, open, and comprehensive access to the elements of the incumbent LECs' networks.⁸

There is no merit to the Bell Companies' claims that the network elements of their local telecommunications services used for data applications (including xDSL services) are somehow exempt from the statutory unbundling obligation. As a practical matter, the ILEC's xDSL services are *intrinsically married* to their local service monopoly. If achieved, the benefits of xDSL are largely measured in terms of much greater bandwidth to homes and businesses through the existing ubiquitous network of telephone access lines.⁹ Thus, the ILEC already controls the lines over which the service is offered, as well as every possible location to connect to those lines (and customers) to competing data networks. The ILEC also effectively controls the electronics deployed as an integral part of a consumer's xDSL service, as a result of technical distance limitations on xDSL services, control and limitations over collocation space for competing

(Footnote continued from previous page)

13717, 13725 (1995) (Computer II requires a facilities-based carrier engaged in "enhanced" services to separate and tariff its "basic" services)).

⁷ The 1996 Act makes perfectly plain that incumbent LECs must unbundle and allow access "at any technically feasible point," and offer all of its local telecommunications services for competing providers. 47 U.S.C. § 251(c)(3)&(d)(2).

⁸ As discussed below, Section 10 of the Act precludes forbearance from the mandates of Section 251(c). This Section 10 limitation reinforces Congressional intent for the ILECs to open their local network to competition, with no exceptions.

⁹ ILEC ADSL service could deliver over the same wire to the home (a) the POTS voice service, and (b) download speeds that are multiples of today's ISDN rates and many times faster than 56.6 kbps modems.

providers, and technical deployment decisions. See ALTS Petition at 16-17.¹⁰ Finally, the ILECs are deeply entrenched in the standards-setting process, and so may ensure that xDSL equipment manufacturing favors their own deployment. If left with no duty to offer the underlying UNEs (including electronics used in the xDSL service) to competing providers, the ILECs stand ready to monopolize data access in the same way (and, indeed, using much of the same equipment) as they now control the local telephony business.

Consistent with the Section 706(a) goal to "promote competition in the local telecommunications market," the deployment of advanced services is best achieved by opening up the incumbent LEC network so that competing providers can use it to deploy innovative services. As Chairman Kennard recently explained, "[t]he best way to ensure more bandwidth is to encourage local competition."¹¹ When competing providers can gain access to necessary elements of the Bell Company network at cost-based rates, advanced data services of all kinds are much more likely to be delivered expeditiously to the American consumer.

B. Functional Collocation Is Critical For Competing Data Providers

Functional collocation rights for CLECs, as well as ISPs, are also important as the ILECs begin to roll-out xDSL technologies and other similar advanced offerings. Because ADSL services can only be offered to customers that are within close proximity (e.g., a wired distance

¹⁰ ILEC claim that stand-alone xDSL equipment is available does not address these issues. Moreover, the Commission has already decided that the availability of a network element from a source other than the ILEC does not relieve the ILEC of its unbundling obligations. "Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." "Implementation of Local Competition Provisions in the Telecommunications Act of 1996," First Report and Order, CC Dkt. No. 96-98, 11 FCC Rcd. 15497, ¶ 283 (1996) (subsequent history omitted).

¹¹ FCC News, "Chairman William E. Kennard Receives Alliance for Public Technology Pioneer Award; Outlines Guidelines for Bandwidth" (Feb. 27, 1998).

of 18,000 feet) of the ILEC central office, functional collocation is a practical necessity for competitors. As a statutory matter, the CLEC should be offered collocation that allows it to enjoy the same functional access to the ILEC network as the ILEC itself enjoys. 47 U.S.C. § 251(c)(6). From a regulatory perspective, the Commission's ongoing Computer III precedent should also ensure that ISPs have access to the equivalent telecommunications that are available to the BOC-affiliated ISP.¹² However, unless the Commission *enforces* the statutes and its own precedent, the ILEC is able to achieve a technical and market advantage over the CLEC and the ISP, due solely its monopoly position.

Similarly, as the ALTS Petition describes (at 18-22), the Commission should prevent ILECs from imposing onerous and dysfunctional collocation conditions on their competitors. The Commission should revisit its rules to better ensure collocation flexibility and efficiency, such as with: virtual collocation options; cageless collocation; cross-connection between collocated providers; and sharing of collocation cages. CIX agrees with ALTS that the Commission must take another look at collocation arrangements, and it encourages the Commission also to develop similar collocation arrangements for ISPs.

C. Forbearance from Section 251, 252, and 271 of the Act Is Not Permitted.

CIX concurs with ALTS (at 34-35) that the 1996 Act statutory obligations of interconnection, unbundling, resale, and collocation apply with equal force in the context of the ILECs' telecommunications data service offerings. The 1996 Congress defined each of these obligations using the broader term "telecommunications," and it did not narrow the application of these obligations to simple voice POTS telephony. The Commission need not engage in the Bell Companies' tortured attempts at rewriting Section 706 of the 1996 Act; it is clear that Congress

¹² Computer III Inquiry, 104 F.C.C. 2d 958, 1036 (1986).

knew that "telecommunications services" are used in the provision of Internet services and that Congress intended for all ILEC telecommunications services to be fully subject to the 1996 Act.

Indeed, the Commission has no statutory authority to forbear from enforcing sections 251, 252, and 271 of the Act. Section 706 merely permits the Commission *to utilize* its forbearance authority in order to promote advanced telecommunications deployment. Congress has articulated a policy in favor of deployment of "advanced telecommunications services," which would factor into the Section 10(a)(3) "public interest" determination in the context of a Section 10 forbearance proceeding. However, the Commission's Section 10 forbearance authority is expressly limited and excludes authority to forbear from Sections 251, 252, 271 of the Act. 47 USC. § 160(d).¹³

Congress carefully crafted Section 10 to recognize only one other independent source of statutory forbearance authority, as found in Section 332(c)(1)(A) of the Act. *Id.* at §160(a) ("*Notwithstanding section 332(c)(1)(A) of this Act*, the Commission shall forbear from applying any regulation or any provision of this Act" that the Commission finds consistent with the standards of Section 10) (emphasis added). Surely, if it had been Congress' intention to create an independent basis for regulatory forbearance under Section 706, then Section 10(a) would have been crafted to expressly reference both Section 332(c)(1)(A) and Section 706. Rather, read in conjunction with Section 10, the Section 706 statutory language ("utilizing . . . regulatory forbearance") merely directs the Commission to generally exercise its Section 10 forbearance authority, among other permissible deregulatory tools, to promote advanced telecommunications.

Nor does Section 706 suggest that the Commission should exercise its forbearance authority in the manner argued for by the ILECs. To the contrary, Section 706 speaks with

¹³ "Bell Operating Companies' Petitions for Forbearance from the Application of Section 272," Memorandum Opinion and Order, CC Dkt. No. 96-149, DA 98-220, ¶¶ 22, 23 (CCB, rel. Feb. 6, 1998).

particularity only of "elementary and secondary schools and classrooms," not of Bell Company relief. 1996 Act, § 706(a). Moreover, the statute directs the Commission to implement Section 706 in ways that "promot[e] competition in the telecommunications market," not to eviscerate the 1996 Act local competition provisions (Sections 251, 252, and 271).

Instead, as the ALTS Petition describes, the Commission should pursue vigorous enforcement of Sections 251, 252, and 271.

II. Interconnection to ILEC Data Networks Is Mandated by the Act, and Is Critical For Network Efficiency.

CIX agrees with the ALTS Petition (at 12-14) that the ability of competing data networks to interconnect with the ILEC dominant network is both required under the Communications Act, and is absolutely essential for competing data networks to operate efficiently.¹⁴

The Bell Companies' various refusals to offer interconnection to competing CLEC networks, as described by ALTS, are obvious efforts to skirt their obligations under the Communications Act. Sections 251-252 of the Act provide a comprehensive scheme of interconnection, whereby competing network providers are vested with rights to demand reasonable interconnection with the ILEC's network. Section 251 does not contemplate exemptions or exceptions from the ILEC's duty to interconnect with competing local networks that may carry data traffic. To the contrary, Section 251(b)(5) obligates the ILECs to establish "compensation arrangements for the transport and termination of *telecommunications*,"¹⁵ which

¹⁴ ILEC arguments that they are not "dominant" in the Internet market are patently flawed. The ILECs are certainly dominant providers of the essential facilities for any information service to customers -- the underlying local telecommunications services. For these reasons, the Commission's longstanding precedent in Computer II and Computer III have regulated BOC entry into new information service markets, subject to a panoply of equal access and unbundling obligations concerning the underlying telecommunications.

¹⁵ 47 U.S.C. § 251(b)(5).

includes telecommunications of data traffic. The Bell Companies' intransigence on this issue, as described by ALTS, confirms that ILECs are using their established market dominance over local network facilities to stop, slow, and generally inhibit the CLECs' efforts to commence local network competition. This is fundamentally contrary to the Congressional objectives of Section 251, and should not be tolerated by the Commission.

Moreover, the ILECs' refusals to interconnect and to deter interconnection is a harm to the public interest because it diminishes the efficiency of, and investment in, all data networks. Without reasonable interconnection to the ILEC network, competing carriers must obtain termination of traffic on the ILEC network through more inefficient routing at higher up-stream connection points on the Internet. This inefficiency causes unnecessary routing, overuse and congestion of the Internet NAPs, slows packet delivery time (which inhibits some high-speed applications), raises the costs of terminating packets, and leads to less secure and reliable Internet communications. This result is fundamentally at odds with the Commission's conclusion in the Access Charge Reform proceeding that "[t]he public interest would best be served by policies that foster . . . technological evolution of the [Internet] network"¹⁶ because, without reasonable and logical interconnection between competing local data providers, the network cannot truly evolve.

Finally, CIX offers that the Commission could also improve local data interconnection and transport by adopting data competitive access provider ("D-CAP") rules, as proposed by ITAA.¹⁷ The Commission should modify slightly its Expanded Interconnection rules so that D-CAPs could interconnect with the ILEC and aggregate data traffic across a given local area. The D-CAP could then offer the aggregated data transport services to local ISPs. CIX also supports

¹⁶ First Report and Order, CC Dkt. 96-262, 12 FCC Rcd. 15982, 16134 (1997).

¹⁷ Comments of ITAA, CC Dkt. Nos. 95-20, 98-10, at 30-31 (Mar. 28, 1998).

ITAA's proposal to extend such D-CAP rights to ISPs, especially in areas where CLEC competition is not yet present.¹⁸

III. FCC Implementation of Section 706 Must Support the States' Initiatives To Open the ILEC Networks to Competition.

The ALTS Petition (at 36-45) asks the Commission to harmonize the actions it takes in furtherance of Section 706 with the significant progress of the States on issues of ILEC network unbundling. CIX wholeheartedly agrees.

The plain language of the statute provides for a joint and harmonious federal and state implementation of Section 706. 1996 Act, § 706(a) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment of . . . advanced telecommunications capability . . ."). This same statutory language also recognizes that, absent appropriate federal preemption, the States have jurisdiction over advanced telecommunications that are intrastate. As ALTS describes, the states have worked hard to establish rules regarding both subloop unbundling and combinations of UNEs. These actions are, of course, in furtherance of the Commission's contemplated progress on unbundling expressed in the Local Competition Order and are also fully consistent with the Iowa Utilities Board decision. Equally significant, these actions serve the express purposes of Section 706 of the Act because they "encourage advanced telecommunications capability" and they "promot[e] competition in the local telecommunications markets." *Id.* at § 706(a), (b).

By contrast, the Bell Companies' Section 706 Petitions ask the Commission to reverse the progress the States have properly made on UNEs. CIX strongly believes that FCC approval of the Bell Companies' Section 706 Petitions -- particularly the requests to curtail UNE and interconnection obligations -- would, in fact, contravene the promotion of local competition. In short, the Bell Companies ask the Commission to exceed its jurisdiction (by encroach on

¹⁸ *Id.* at 31.

authority left to the States under Section 2(b) of the Act) and to violate the plain terms of Section 706.

CIX agrees with ALTS that the Commission should implement Section 706 in a manner that is consonant with and, in all cases, does not preclude State actions to invigorate the competitive market for local data services. It is now beyond serious question that the ILECs are significantly rolling-out in-region DSL services and marketing those services to their existing base of customers. Strong UNE rules with vigilant enforcement become more and more critical every day that the Bell Companies market their own DSL service and deny competitors reasonable access. CIX urges the Commission to encourage innovative state rules and orders that address competition in the local data market.

Conclusion

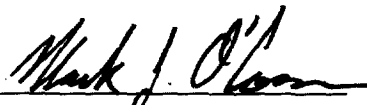
For the reasons stated above, CIX supports the ALTS Petition.

Respectfully submitted,

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